General Guidelines for Prosecuting Wildlife and Boating Cases in North Carolina

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Each year, hundreds of citations are issued by North Carolina Wildlife Enforcement Officers for a wide variety of hunting, fishing, and boating violations. The vast majority of these violations are waiverable misdemeanors which are paid off, while only a relatively small percentage of these charges ever get into court.

The few cases that do make it to trial, however, may seem somewhat confusing to judges, prosecutors and attorneys who rarely deal with such offenses. Most of us who deal with criminal offenses are far more accustomed to dealing with traffic and routine criminal violations, but wildlife offenses are somewhat different. In large measure, this is due to the fact that most wildlife violations arise from activities that are highly regulated and therefore subject to greater investigatory powers on the part of the Wildlife Officers than more general criminal offenses.

The purpose of this paper is to provide a brief overview of the underlying principles of fish, game and boating law, and to provide a brief foundation for handling such charges when a trial is necessary.

General Issues Involving Fish and Game Laws

The North Carolina Wildlife Resources Commission (Hereinafter "Commission") is tasked with the conservation of wildlife resources belonging to the people of this

State.[1] In addition, the Commission is charged with the oversight and enforcement of boating safety laws on public waters.[2] All activities under the jurisdiction of the Commission are highly regulated, and many require a license or registration to lawfully engage in such activities.

Because the Commission is a regulatory agency, many of the charges brought by Wildlife Officers are based on violations of rules promulgated by the Commission pursuant to legislative authority.[3] Thus, most of the charges brought by Wildlife Officers will cite to the North Carolina Administrative Code instead of (or in addition to) a particular statute, and the elements of the violation are most likely to be found within the code.

As a general principle, people who participate in activities that are highly regulated by one or more government agencies are generally held to a higher level of understanding of the law governing such activities, as well as being subject to a higher level of scrutiny when engaged in these activities. Examples of such regulated activities include piloting an aircraft, operating an amateur radio station, operating many types of vessels, as well as engaging in hunting, fishing or trapping.

Under North Carolina law, people who engage in hunting, fishing, trapping or boating may be subject to inspection stops[4] by Wildlife Officers in a manner that does not require "reasonable articulable suspicion." North Carolina law also permits Wildlife Officers to inspect vessels, game or fish taken, and equipment or other instrumentalities used in the regulated activities. In order to do such inspections, however, officers do have to meet a specific legal standard. They must have at least a "reasonable belief" that a person is engaging in a regulated activity.[5] This inspection authority is often confused with the constitutional provisions regarding search and seizure.

Finally, Wildlife Officers are most likely to make their cases in open fields and woods on private lands, and

[1] G.S. § 143-239 G.S. § 113-131(a)
[2] G.S. § 75A-3(a)
[3] Rules of the Commission are found in Title 15A, Chapter 10 of the NCAC.
[4] G.S. § 113-136
[5] Id.

this may also raise constitutional questions regarding search and seizure, as well as trespass issues.

Although many of the charges you are likely to hear do not appear on the surface to be particularly serious violations, the laws behind such charges are based on a system of wildlife conservation that is designed to insure healthy and viable wildlife populations for future generations. Other "safety" violations are designed to insure that people who are out enjoying the water or woods will have a good day and return home safely.

While the Commission spends a great deal of time and money on educating the public as to the "why" of wildlife and boating laws, the ultimate means of enforcing compliance is through law enforcement action. Even here, however, the desire is to educate rather than prosecute. Over forty percent of all tickets written by Wildlife Officers statewide are warning tickets.

Specific Issues Likely To Be Encountered

Of those wildlife and boating citations that do require a citation, many carry only a fine and costs. However, some do carry significant monetary fines and a risk of forfeiture of vehicles or equipment. Finally, many people who are charged are dedicated sportsman who will fight vigorously to retain hunting privileges that must be forfeited upon conviction of certain specified offenses. Obviously, these more serious offenses are the ones most likely to come to trial.

What follows is a discussion of the basic principles of enforcement of boating and wildlife laws, as well as issues that are likely to come up during the course of a trial.

Definition of "Take"

There are a number of working definitions used by the Commission in the enforcement of fish and game laws under its jurisdiction.[6] A comprehensive discussion of these definitions is beyond the scope of this paper, but three of them, "to hunt," "to fish," and "to take," are particularly

[6] These definitions are found at G.S. §§ 113-128, - 129 and -130.

important and form much of the basis of enforcement of wildlife laws.

The definitions of "to hunt" and "to fish" found in G.S. § 113-130 are deceptively simple:

> (5) To Fish. -- To take fish.
>
> (5a) To Hunt. -- To take wild animals or wild birds.

Both definitions contain the phrase, "to take," and this phrase is critical to an understanding of the definitions of hunting and fishing. "To take" is defined in G.S. § 113-130 as follows:

> (7) To Take. -- All operations during, immediately preparatory, and immediately subsequent to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession any fisheries resources or wildlife resources.

When read together, the legal significance of these definitions is that it is not necessary for an officer to directly observe a person "pulling the trigger" or "reeling in a fish" to establish that the person was engaged in the act of hunting or fishing. This is important because a wildlife officer seldom observes a person actually shooting game or catching fish.

Wildlife officers do often observe activities before or after the actual act that results in the taking of fish or game. These activities that are "immediately preparatory" or "immediately subsequent to" the taking may be used to establish the lawful authority for an inspection of the person's license and equipment (discussed below). The activities also make it considerably easier to establish that the person charged was hunting or fishing when such is an element of the alleged violation, without having to catch the person in the act. Therefore, the case is generally easier to prove. Indeed without this rather broad definition of taking, it would be virtually impossible to make many of the charges brought by wildlife officers. And while this definition of take may seem somewhat broad, it is very similar to that of most other state jurisdictions, as well as federal law.

Inspection Authority

The jurisdictional and subject matter authority of Wildlife Officers is set forth at G.S. § 113-136. This statute also sets forth the authority of Marine Fisheries Officers.[7] The statute provides that Wildlife Officers have statewide territorial jurisdiction over all matters within their subject matter jurisdiction, as well as the authority of peace officers statewide.

This statute also contains one very important provision that is unique to North Carolina law, commonly known as "inspection authority." As noted previously, Wildlife Officers are given the authority to inspect persons who they reasonably believe to be engaged or have recently been engaged in one or more of the activities regulated by the Wildlife Resources Commission for the purpose of determining whether they are doing so in a lawful manner. As applied to wildlife officers, the authority to do this is found at G.S. § 113-136(f) & (g):

> (f) Inspectors and protectors are authorized to stop temporarily any persons they reasonably believe to be engaging in activity regulated by their respective agencies to determine whether such activity is being conducted within the requirements of the law, including license requirements. If the person stopped is in a motor vehicle being driven at the time and the inspector or protector in question is also in a motor vehicle, the inspector or protector is required to sound a siren or activate a special light, bell, horn, or exhaust whistle approved for law-enforcement vehicles under the provisions of G.S. 20-125(b) or 20-125(c).
>
> (g) Protectors may not temporarily stop or inspect vehicles proceeding along primary highways of the State without clear evidence that someone within the vehicle is or has recently been engaged in an activity regulated by the Wildlife Resources Commission...

You will note that subsection (f) permits Wildlife Officers to briefly detain persons who they ***reasonably believe*** to be engaged (or recently engaged) in a regulated activity to determine whether they are doing so in compliance with the law. This provision permits officers to conduct license checks, as well as the appropriate checks of any fish or game in the possession of the person being

[7] In Chapter 113, Wildlife Officers are referred to as "protectors" and Marine Fisheries Officers are referred to as "inspectors." See G.S. § 113-128.

inspected, and any equipment used to take such fish or game.

When a Wildlife Officer wishes to stop someone on a vehicle traveling on a "primary highway," the standard rises to one of ***clear evidence***. Although the term "primary highway is nowhere defined in statute, it has been presumed by the Enforcement Division to refer to Interstate highways, U.S. routes, and N.C. routes. It is presumed not to refer to all other roads, whether paved or unpaved, although it may arguably apply to such roads in more urban or high traffic areas, or where such roads are multilane. Regardless, the standard for stopping on a primary highway is higher than for other inspection stops.

However, neither case requires the officer who wishes to conduct an inspection stop to have any suspicion that the individual may have committed a criminal offense. This is obviously different from the typical "Terry stop" which requires at least reasonable suspicion.

Pursuant to G.S. § 113-136(k), once such detention for inspection is made, it is unlawful to refuse to allow inspection of any license or equipment. However, if an individual refuses to allow an inspection or license check, the inspection may not be done forcibly. If the officer does not have an independent basis to search, other than the inspection authority, the officer may only charge the individual with failure to permit an inspection pursuant to G.S. § 113-136(j). However, if circumstances warrant, the individual may also be arrested rather than cited, although arrest is generally only used as a last resort.

From time to time, a defense attorney may raise the objection to charges arising from an inspection stop that the officer had no reasonable suspicion or probable cause to detain the individual. However, in the case of activities regulated by the Commission, it is only necessary that the officer have the appropriate level of belief that the person is or has recently been engaged in a regulated activity.

The use of the inspection authority has been held to be constitutional.[8] Even so, in their training, Wildlife Officers are cautioned not to rely too heavily on this

[8] See ***State v. Pike***, 139 N.C. App. 96, 532 S.E.2d 543 (2000).

authority in other than routine license and vessel registration checks. Instead, they are encouraged to rely on constitutional criteria for determining the appropriateness of a particular detention whenever possible.

Enforcement of Laws within the Curtilage of a Dwelling

As you might imagine, the authority to inspect is not unfettered. G.S. § 113-136(l) provides as follows:

> (l) Nothing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures.

Wildlife Officers seeking to enter the curtilage of a dwelling or the living quarters of a vessel for the purpose of conducting an inspection may not rely on their inspection authority. Instead, they must have some constitutional basis for a search. This is yet another reason Wildlife Officers are trained to rely on constitutional justification whenever possible.

Enforcement of Laws in Open Fields and Woods

Most fish and game law violations occur in open fields and woods. When officers enter onto open fields and woods and charges result, defendants will sometimes challenge the constitutionality of such entry, but so long as the entry is onto open fields and woods, it is not unconstitutional.

It is well-established law that the Fourth Amendment to the United States Constitution protects persons from unreasonable invasions of their privacy. This protection is generally intended to afford protection to persons in their dwelling places and immediate surroundings, and to a lesser extent, in their vehicles. As a practical matter, before law enforcement officers may constitutionally enter or search a person’s home, curtilage, or vehicle, they must either have either a warrant or some exigent circumstances that permits entry. Should either of these conditions not exist, any evidence of criminal activity may be suppressed, and in extreme circumstances, civil action against the officers may lie.

However, this is not the case where officers enter onto private lands that are not a part of a dwelling or

curtilage, but are instead open fields or woods. In such cases, the "Open Fields Doctrine" applies. In ***Oliver v. United States*** the United State Supreme Court has held that when law enforcement officers are on private property outside of the curtilage of a dwelling, they are not conducting a search within the meaning of the Fourth Amendment and there is no reasonable expectation of privacy.[9]

> "Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marijuana upon secluded land and erected fences and 'No Trespassing' signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marijuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement."[10]

In ***Oliver***, the Court clearly states that the law of trespass forbids intrusions upon land that the Fourth Amendment would not proscribe. However, in a footnote the Court also explains that:

> The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. ***To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers***.[11]

(Emphasis added.)

A similar position was previously adopted by our State in ***State v. Prevett***, 43 N.C.App. 259 S.E.2d 595 (1979).

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[9] ***Oliver v. United States***, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d. 214 (1984).
[10] ***Id.*** at 182-183.
[11] ***Id.*** at footnote 15

There, the court said that officers lawfully on the premises to conduct a general inquiry or investigation are not trespassers.[12]

The right to enter private lands was also applied to wildlife officers in ***State v. Ellis***, 241 N.C. 702, 86 S.E.2nd 272 (1955). There, the court found that a wildlife officer checking fishing licenses on private land pursuant to statutory authority was not trespassing. While the specific statute relied on has since been repealed, it has been replaced by the considerably broader inspection authority discussed above.

Issues Involving Boating Stops

Boating stops present something of a special case for Wildlife Officers. The North Carolina Safe Boating Act[13] provides that the Commission is the primary enforcer of boating laws on public waters in this state. However, all other law enforcement officers with appropriate territorial jurisdiction may enforce these laws as well. G.S. § 75A-1(a) permits all law enforcement officers to inspect vessels as necessary:

> § 75A-17. Enforcement of Chapter
>
> (a) Every wildlife protector and every other law-enforcement officer of this State and its subdivisions shall have the authority to enforce the provisions of this Chapter and in the exercise thereof shall have authority to stop any vessel subject to this Chapter. Wildlife protectors or other law enforcement officers of this State, after having identified themselves as law enforcement officers, shall have authority to board and inspect any vessel subject to this Chapter.

This provision would appear to give all law enforcement officers an inspection authority with respect to vessels that is similar to the authority given to Wildlife Officers pursuant to G.S. § 113-136, although it is not entirely clear that this is the case. However, there is no case law in this state challenging the authority of any officers other than Wildlife Officers to do so.

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[12] See also, ***State v. Church***, 110 N.C.App. 569, 430 S.E.2d. 462 (1993)
[13] G.S. § 75A-1 ***et seq***.

State v. Pike, 139 N.C. App. 96, 532 S.E.2d 543 (2000) is the only state case challenging this authority to stop a vessel by a Wildlife Officer for inspection. The court relied on the inspection authority in G.S. § 113-136 rather than the inspection authority stated in G.S. § 75A-17. The State also asserted the inspection authority of Chapter 75A, but it was not invoked by the Court in its decision.

The case cited in the annotation[14] to G.S. § 75A-17, ***Klutz v. Beam***, 374 F. Supp. 1129 (W.D.N.C. 1973), at first glance appears to take a position that would tend to look unfavorably on vessel inspections. ***Klutz*** was a federal civil action which sought to enjoin Wildlife Officers from future boarding of Mr. Klutz' vessel after he had been subjected to a very lengthy inspection by two Wildlife Officers. The inspection encompassed every area of the boat, including the toilet facilities in the living quarters but yielded no violations.

Klutz was successful in obtaining injunctive relief, and the case was never appealed. The opinion focused on the entry by the officers into the living quarters of the vessel and the reasonable expectation of privacy in that area. This issue was addressed by the enactment of G.S. § 113-136(l) which, as noted above, makes the living quarters of a vessel inapplicable to inspections by Wildlife Officers in the absence of constitutional justification. Therefore, it would seem that this case is inapplicable to the law as it currently exists, at least with respect to Wildlife Officers, so long as the living quarters of the vessel are not entered without lawful justification.

Operating While Impaired

Most offenses for which a vessel operator might be charged as a result of an inspection stop are relatively minor and generally only involve a fine. A few, however, are more serious, such as operating a vessel in a negligent or reckless manner.[15] The most notable exception however, is that of operating a vessel subject to some impairing

[14] Found in the official publication of the General Statutes as published by LexisNexis (2009). The case has also been cited in previous editions since the case was decided.
[15] G.S. § 75A-10(a)

substance.[16] Even here, however, there are no consequences beyond those imposed for a Class 2 misdemeanor.[17]

North Carolina has no licensing requirement for persons operating vessels, and in the absence of a required license, there is no license or privilege to automatically suspend if a person is convicted of this offense. However, the Commission believes that it is within the inherent authority of the court to order an individual not to operate a vessel as a condition of probation, if warranted, and a number of judges have so ordered in the past.

The operating while impaired (OWI) statute appears very similar to the driving while impaired statute:

> (b1) No person shall operate any vessel while underway on the waters of this State:
>
> (1) While under the influence of an impairing substance, or
>
> (2) After having consumed sufficient alcohol that the person has, at any relevant time after the boating, an alcohol concentration of 0.08 or more.[18]

Just like the DWI statute, the offense may be proven by either (1) appreciable impairment or (2) blood alcohol concentration.

One difference is that there are very specific requirements for the administration of a chemical test subsequent to arrest for driving while impaired, including certain rights of a defendant with respect to the testing process. These rights are set forth in statute and rule in some detail.

There are no analogous rights with respect to chemical testing for those arrested for OWI. In fact, although the chemical tests are administered following the same rules promulgated for chemical testing for drivers (with some modifications, including the rights given), there are no rules specified for chemical testing for vessel operators. This issue has surfaced from time to time in the local courts in the last several years, and has sometimes led to the exclusion of the chemical test results arising from an

[16] G.S. § 75A-10(b)
[17] G.S. § 75A-18(b)
[18] G.S. § 75A-10(b1)

OWI stop. As of yet, there has not been an opportunity for this issue to be reviewed on appeal.

However, Wildlife Officers are encouraged in their training to build OWI cases based on evidence demonstrating appreciable impairment rather than relying solely on blood alcohol concentration. All Wildlife Officers, as well as many local law enforcement officers are now receiving training on determining impairment using nationally recognized tests that have been specifically developed for use on the water, as well as observations of the operation of the vessel and defendant's physical condition and demeanor.

Driving While Impaired

Wildlife officers often patrol remote areas at night. In the course of these patrols, it is not unusual for them to observe motorists who appear to be driving while impaired. While DWI is not within the ordinary subject matter jurisdiction of wildlife officers, G.S. § 113-136(d1) provides:

> (d1) In addition to law enforcement authority granted elsewhere, a protector has the authority to enforce criminal laws under the following circumstances:
>
> (1) When the protector has probable cause to believe that a person committed a criminal offense in his presence and at the time of the violation the protector is engaged in the enforcement of laws otherwise within his jurisdiction…

Pursuant to this authority, Wildlife Officers have stopped persons suspected of impaired driving for many years, and for the most part, their authority to stop has not been challenged. However, prior to 2009, the issue did come up from time to time, and some courts allowed motions to dismiss based on a lack of subject matter jurisdiction or the authority of a Wildlife Officer to stop.

In November, 2006, Wildlife Officer Brent Hyatt, while on patrol for night deer hunters, observed a female driver operating her vehicle in a very erratic manner and stopped her based on a concern for public safety. After he determined that she was impaired, Officer Hyatt contacted Highway Patrol Trooper Leah McCall who arrested the driver.

The defendant appealed her district court conviction of Level I DWI to the superior court, where she challenged the legality of the stop. The court denied the motion to suppress on grounds that the stop was constitutional, but opined that Officer Hyatt might have violated G.S. § 113-136. The defendant subsequently remanded her case back to the district court for entry of judgment.

She also filed a civil suit against Officer Hyatt, alleging that the stop was illegal and invoked a number of claims arising from the allegedly illegal stop. In ruling on an appeal of summary judgment granted in favor of the defendant, the Court of Appeals unequivocally affirmed the authority of a Wildlife Officer to stop for impaired driving.[19]

Where a Wildlife Officer observes possible impaired driving, he or she will generally attempt to contact the Highway Patrol or local law enforcement to make the stop, or to arrest after the stop. However, Wildlife Officers are prepared to stop and arrest if public safety warrants. In addition, almost all Wildlife Officers are trained and certified as chemical analysts and are fully qualified to administer chemical tests in impaired driving cases.

Issues Involving other Regulated Activities

It is unlawful to hold wild animals in captivity without a captivity license or permit issued by the Commission:

> § 113-272.5. Captivity license
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> (a) In the interests of humane treatment of wild animals and wild birds that are crippled, tame, or otherwise unfit for immediate release into their natural habitat, the Wildlife Resources Commission may license qualified individuals to hold at a specified location one or more of any particular species of wild animal or wild bird alive in captivity. ***Before issuing this license, the Executive Director must satisfy himself that issuance of the license is appropriate under the objectives of this Subchapter, and that the wild animal or wild bird was not acquired unlawfully or merely as a pet.*** Upon refusing to issue the captivity license, the Executive Director may either take possession of the wild animal or wild bird for appropriate disposition or issue a captivity permit under G.S. 113-

[19] *Parker v. Hyatt*, 196 N.C. App. 489, 675 S.E.2d 109 (2009), *disc. review denied*, 363 N.C. 655, 685 S.E.2d 104 (2009)

274(c)(1b) for a limited period until the holder makes proper disposition of the wild animal or wild bird.

(Emphasis added)

By statute, these licenses or permits may not be issued to people who are keeping wildlife in captivity as pets. However, for many years the holding of wild animals in captivity was not very closely monitored by the Commission, and such licenses or permits were routinely issued with little or no investigation as to the reason the animal was being held. So long as the holder complied with minimum standards of care and caging, the purpose was not generally questioned. This was particularly true with regard to persons holding deer in captivity.

This situation changed dramatically when chronic wasting disease (CWD) was discovered in Wisconsin in 2002. Chronic wasting disease is a disease affecting the central nervous system of deer, elk, and other cervids. This disease is not known to have a connection to humans, although a connection has not been conclusively ruled out. Regardless, where CWD is found in a deer population, it has a devastating impact on hunting and other associated sporting activities, as well as those sectors of the economy supported by them.

Prior to its discovery in Wisconsin, CWD was confined to locations in the western United States. It is probable that this disease was transmitted by cervids held in captivity that were transported from the western United States to Wisconsin. Once discovered, it had a significant impact on the economy of the area.

Soon after the disease was discovered in Wisconsin, it was determined that there were facilities holding deer in captivity in North Carolina that had come from counties in Wisconsin adjacent to the counties in which this disease was discovered. As a result, the Commission immediately placed a moratorium on the issuance of any new captivity licenses or permits for deer or other cervids in North Carolina. This had a significant impact on captive cervid facilities that were being operated commercially, as well as a number of license holders who were keeping deer as pets.

Subsequently, in consultation with these commercial operators and other interested parties, tougher legislation

and more stringent rules were enacted to regulate captive cervid facilities. These facilities are now inspected twice a year, and these inspections sometimes result in citations being issued. The rules governing captive cervid facilities are somewhat complicated, and convictions of many of the offenses can result in suspension of a captivity license. Therefore, although these cases are somewhat rare, they are often hotly contested when a commercial interest is at stake. Each case will probably be different, and a thorough discussion of the various offenses is beyond the scope of this paper.

In 2010, WRC began developing a plan to certify herds that qualify as being CWD free. This effort is the culmination of many years of study and work at both the state and federal level. For licensees whose herds qualify for certification, this will mean greater freedom of movement for their animals, but inspections of cervid facilities will remain important, and you are still likely to see charges based on such violations. Indeed, some of these charges could impact the application for certification.

Conclusion

This paper has made no attempt to deal with the elements of specific wildlife offenses. Those may generally be gleaned by a careful reading of the statute or rules under which a defendant is charged. Rather, we have attempted to provide a background for the enforcement of these laws, particularly as it relates to constitutional issues which may be raised.